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# A Prescription for Gender: How Medical Professionals Can Help Secure Equality for Transgender People

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# A PRESCRIPTION FOR GENDER: HOW MEDICAL PROFESSIONALS CAN HELP SECURE EQUALITY FOR TRANSGENDER PEOPLE

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## INTRODUCTION

Transgender people have made tremendous legal gains in the last several years. We live in a period of rapid social change, hopefully approaching a time when transgender individuals and our families enjoy the same legal rights and privileges afforded to other members of society. However, we are not there yet.[1] This essay discusses the role medical professionals must play if transgender people are to achieve full humanity in light of legal developments in the areas of employment and family law.[2]

Medical professionals are at the heart of directing and implementing policies that have an enormous effect on the lives of transgender individuals. In a world of unpredictability for outcomes in cases involving transgender litigants, medical professionals can be influential in securing advantageous outcomes. Medical and professional skills are critical to the transgender community, not only for the specific medical expertise physicians and others provide to their patients, their patients' families, employers, and communities, but also because of the direct role medical findings and testimony play in the courts. Through a concise review of the pertinent case law, I will articulate some of the ways in which medical professionals can also facilitate and enrich the lives of transgender patients and clients by formulating and supporting definitions and determinations of gender that can then be applied in a legal context.

Part I reviews cases involving discrimination against transgender people in

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1. This article will primarily address the significant advances made in the areas of family and non-discrimination law. Despite these advances, transgender people continue to be the victims of physical violence. *See, e.g., Brandon ex rel. Estate of Brandon v. County of Richardson*, 624 N.W.2d 604, 621 (Neb. 2001) (sheriff held liable for failing to protect Brandon Teena's life after he reported rape and threats against his life to authorities); Ellen Miller, *Killer Agrees to Plea Bargain; Man Could Get up to 48 Years for Beating Gay Navajo Teen*, Rocky Mtn. News, Feb. 9, 2002, at 1B (sixteen year old bludgeoned to death and his body left to rot because of his gender and sexual orientation); Bill Miller, *D.C. Settles Bias Suit in 1995 Death; Rescue Workers Mistreated, Mocked Injured Transvestite*, Wash. Post, Aug. 11, 2000, at B01 (woman dies when paramedics make derogatory comments and discontinue treatment upon learning she is transgender).

2. This essay is based, in part, on a keynote speech given by the author at the Harry Benjamin International Gender Dysphoria Association ("HBIGDA") on November 2, 2001 in Galveston, Texas. The author is on the legal committee for HBIGDA.

employment, credit, public accommodations, and housing. Part II addresses the state of family law as it has been applied to transgender people. Part III concludes by suggesting ways medical professionals can play an instrumental role in achieving favorable outcomes for transgender litigants, particularly in the area of family law.

## I. STATE AND FEDERAL NON-DISCRIMINATION LAWS

Despite recent advances, transgender people have been historically excluded from the reach of federal laws prohibiting discrimination on the basis of sex.[3] Non-discrimination laws in the United States have changed dramatically in the last fifty years, but with few exceptions, the laws of most jurisdictions still do not expressly protect transgender people against discrimination.[4] With the passage of the Civil Rights Act of 1964 ("Act"),[5] Congress not only outlawed discrimination on the basis of race, but prohibited discrimination based on sex, national origin, and religion as well.[6] After the Act's passage, most states that had not already done so enacted laws prohibiting sex discrimination in employment, credit, housing, and public accommodations.[7]

In the late 1970s and early 1980s, transgender employees who encountered discrimination in the workplace began to bring claims under federal and state laws.[8] While the facts varied, all arose when a transgender person was fired,

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3. For articles analyzing the recent positive trend and the legal developments that fostered it *see* Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 Wm. & Mary J. Women & L. 37 (Fall 2000); Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 Wm. & Mary J. Women & L. 5 (Fall 2000); Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 Temp. L. Rev. 283 (1997); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev. 1 (1995); and Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1 (1995).

4. Minnesota, New Mexico, and Rhode Island have enacted discrimination laws that expressly include transgender people. Minn. Stat. Ann. § 363.01(45) (West WESTLAW through 2002 1st Spec. Sess.); N.M. Stat. Ann., § 28-1-2 (Michie, WESTLAW through 2002 2d Reg. Sess.); R.I. Gen. Laws § 11-24-2 (2001), Protections for transgender people at the local level have been expanding by leaps and bounds. At the time of drafting this article, over 53 local jurisdictions have adopted transgender-inclusive non-discrimination ordinances. *See* http://www.transgenderlaw.org/ndlaws/chart.pdf; *see also* Paisley Currah & Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers* (June 2000) *at* http://www.nclrights.org/publications/tghandbook.htm (last visited October 27, 2003).

5. *See* Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-2(a)(1) (West 2002).

6. Charles Whalen & Barbara Whalen, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-16 (1985).

7. *See, e.g.*, Mass. Gen. Laws Ann. ch. 151B, § 4 (West 2002); Me. Rev. Stat. Ann. tit. 5, § 4571 (West 2001); N.J. Stat. Ann. § 10:5-4 (West 2001).

8. *See* Holloway v. Arthur Anderson & Co., 566 F.2d 659, 661 (9th Cir. 1977) (as narrowly framed by the court, the issue was "whether an employee may be discharged, consistent with Title VII for initiating the process of sex transformation"); Grossman v. Bernards Township Bd. of Educ., 1975 WL 302, at *1 (D.N.J. 1975) (plaintiff alleged sex discrimination in violation of Title VII after being discharged from her teaching position following sex-reassignment surgery); Ashlie v. Chester-Upland Sch. Dist., No. CIV.A. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *2 (E.D. Pa. 1979) (plaintiff challenged her discharge

harassed, or denied employment for being transgender, before, during, or after transitioning. All of these early attempts to secure workplace protections for transgender people through the courts failed.

Of the many cases holding that transgender people enjoyed no protection under the Act, two typify the hostility of the federal courts towards transgender litigants. The case of *Ulane v. Eastern Airlines*,[9] involved a highly regarded commercial pilot terminated by Eastern Airlines upon returning to her job after undergoing sex reassignment. The plaintiff argued that since her ability to perform her job was unaffected by her transition, the termination had to have been the result of the transition itself.[10] The Seventh Circuit disagreed.[11] It freely acknowledged the dearth of legislative history to shed light on the intent of Congress in enacting the sex discrimination prohibition of Title VII[12] and that adding "[t]his sex amendment [to the race discrimination prohibition of Title VII] was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act."[13] Yet the court nevertheless concluded that Congress *must have had* "a narrow view of sex in mind when it passed the Civil Rights Act."[14] Why such a conclusion was ineluctable is unclear, especially given the fact that "remedial statutes [like the Civil Rights Act] should be liberally construed."[15]

The reasoning in the second case, *Sommers v. Budget Marketing, Inc.*,[16] is equally flawed.[17] Two days after hiring Ms. Sommers for a clerical position, Budget learned she was transgender. It immediately terminated her employment, ostensibly for "misrepresent[ing] herself as an anatomical female" despite having the "anatomical body of a male."[18] How such alleged misrepresentation of Ms. Sommers' gender affected her ability to perform her job is unknown.

Sommers argued that she was terminated because of her "anatomical sex," which she conceded was male.[19] While Budget did not dispute the analytical soundness of plaintiff's position, it argued it was beside the point because transgender people were categorically excluded from coverage under Title VII. The Eighth Circuit agreed.[20] Like the Seventh Circuit in *Ulane,* the court

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by the school board on "procedural and substantive due process grounds, as well as on equal protection grounds" when she was fired after undergoing sex-reassignment surgery).

9. 742 F.2d 1081, 1082-83 (7th Cir. 1984).

10. *Id.*

11. *Id.* at 1087.

12. See *supra* note 6.

13. Ulane v. Eastern Airlines, 742 F.2d 1081, 1087 (7th Cir. 1984).

14. *Id.* at 1086. Interestingly, the court conjectured that had Congress viewed the Act as protecting transgender people from sex discrimination, such a view "would no doubt have sparked an interesting debate." *Id.* at 1085.

15. *Id.* at 1086.

16. Sommers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982).

17. *Id.* at 748.

18. *Id.*

19. *Id.* at 749.

20. *Id.* at 749, 750.

acknowledged that the legislative history shed little light on Congress's intent concerning the scope of sex discrimination prohibitions.[21] Yet it nevertheless concluded that "the major thrust of the 'sex' amendment was towards providing equal opportunities for women."[22]

As the decisions of the courts of appeal in *Ulane* and *Sommers* illustrate, the cases holding against transgender litigants and in favor of discriminatory employers are characterized by disturbing, highly problematic, result-oriented reasoning.[23] In contrast, the arguments advanced by the transgender plaintiffs

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21. Ulane, 742 F.2d at 1085.

22. *Id.* at 750.

23. *See, e.g., Ulane*, 742 F.2d at 1087 (finding that "if Eastern did discriminate against Ulane, it was not because she is female, but because *Ulane* is a transsexual" and thus is not protected by Title VII); *Sommers*, 667 F.2d at 750 ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the [Civil Rights] Act"). *Ulane* and *Sommers* typify the kind of specious reasoning employed by numerous federal courts to reject the claims brought by transgender litigants. *See also Holloway*, 566 F.2d at 664 (refusing to extend protection of Title VII to transgender people either as individuals or as a class); Grossman v. Bernards Township Brd. of Ed., 1975 WL 302, *4 (September 10, 1975) ("despite the plaintiff's conclusory allegations of sex discrimination, it is nevertheless apparent on the basis of the facts alleged by the plaintiff that she was discharged by the defendant school board not because of her status as a female, but rather because of her change in sex from the male to the female gender"); Voyles v. Ralph K. Davies Medical Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975) ("The legislative history of as well as the case law interpreting Title VII nowhere indicate that 'sex' discrimination was meant to embrace 'transsexual' discrimination, or any permutation or combination thereof. . . . Situations involving transsexuals, homosexuals or bisexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions"); Powell v. Read's Inc., 436 F. Supp. 369, 371 (D.Md. 1977) ("The gravamen of the Complaint is discrimination against a transsexual and that is precisely what is not reached by Title VII"); Terry v. EEOC, 1980 WL 334, *2 (E.D. Wis. Dec. 10, 1980) (Plaintiff, transgender employee, filed a complaint with the EEOC when she was not hired as a waitress/hostess by Marc's Big Boy Corporation. The EEOC and the Wisconsin Department of Industry dismissed Terry's complaint, and she filed suit in federal court alleging discrimination by her prospective employer and both agencies. In rejecting her claim, the District Court held that the defendant was free to refuse the plaintiff employment precisely *because* she was transgender. She was "not being refused employment because she is a man or because he is a woman . . . Title VII and the constitution do not protect him . . . [t]he law does not protect males dressed or acting as females and vice versa."); Kirkpatrick v. Seligman & Latz, 636 F.2d 1047, 1050, 1051 (5th. Cir. 1981) ("[T]here is no allegation of animus towards transsexuals as a class or against the plaintiff as a member of the class. The animus, if any is alleged, is directed towards the conduct of the plaintiff in violating the store's dress code, regardless of her membership in a class of transsexual persons"); Emanuelle v. United States Tobacco Co., Inc., 1987 WL 19165, at *2 (N.D. Ill., October 27, 1987) ("Since *Ulane v. Eastern Airlines, Inc.*, it has been clear that plaintiff's sexual status is not a basis for claiming federally protected rights"); Dobre v. National R.R. Passenger Corp., 850 F. Supp. 284, 287 (E.D. Pa., 1983) ("The acts of discrimination alleged by the plaintiff were not due to stereotypic concepts about a woman's ability to perform a job nor were they due to a condition common to women alone. If the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to become a female"); Underwood v. Archer Mgmt. Serv., Inc., 857 F. Supp. 96, 98 (D.D.C., 1984) ("The Plaintiff's Complaint gives no indication that any discrimination took place on account of her being a woman or a condition associated therewith. Ms. Underwood fails to allege any discrimination on the basis of her being a woman, in that she merely indicates that she was discriminated against because of her status as a transsexual – that she transformed herself into a woman – but alleges no facts regarding discrimination because she is a woman"); Broadus v. State Farm Inc., 2000 WL 1585257, at *4 (W.D. Mo., Oct. 11, 2000) ("Sexual stereotyping which plays a role in an employment decision is actionable under Title VII. It is unclear, however, whether a

were cogent, straightforward, and seemingly obvious. It is difficult, analytically, to deny that if an employee was considered qualified when known to the employer as male and unqualified simply for undergoing medical care and treatment to transition to living as female that the root cause of the termination is the employee's newly presented sex.[24] Despite the argument's simplicity and clarity, the courts essentially validated discrimination against transgender people by determining that discrimination *due to a change of sex* is somehow meaningfully distinct from discrimination *because of sex.*[25]

The courts' findings in these early cases mirrored cultural biases against transgender persons by showing a failure of insight, understanding, or compassion.[26] Twisting logic to force negative outcomes, courts concluded that transgender people facing discriminatory treatment in the workplace could not have been treated adversely either for being male or female.[27] Rather, they were denied protection under the law because courts deemed them neither male nor female,[28] or, perhaps because they were considered *both* male and female. The emerging judicial consensus seemed to be that transgender people are a

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transsexual is protected from sex discrimination and sexual harassment under Title VII. In *Price Waterhouse,* the plaintiff was not a transsexual"); Oiler v. Winn-Dixie Louisiana, Inc, 2002 WL 31098541, at *6 (E.D. La., Sept. 16, 2002) ("This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex. After a review of the legislative history of Title VII and the authorities interpreting the statute, the Court agrees with *Ulane* and its progeny that Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex. While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase 'sex' has not been interpreted to include sexual identity or gender identity disorders").

24. *See Ulane*, 742 F.2d at 1082-83 (stating plaintiff's argument that Eastern Airlines had no reason to discharge Ulane other than sex); *see also* Ashlie v. Chester Upland Sch. Dist., 1979 U.S. Dist. LEXIS 12516, at *17 (E.D. Pa., May 9, 1979). (finding that Ashlie "was discharged not on the basis of her status as former man, present woman or transsexual, but on the basis of her conduct—in metamorphosing from man to woman").

25. The illogical nature of this distinction is illustrated by an example offered by Shannon Minter and Paisley Currah. "The incoherence of this purportedly meaningful distinction (between sex and change of sex) is apparent the moment one imagines a court applying a similar distinction in a case involving discrimination on any other ground. It is unlikely, for example, that an employer who terminated an employee for changing her religious affiliation or nationality would be absolved of liability on the ground that he did not object to the employee's new religion or national origin, but only to the change of religion or national origin. Yet, the only difference between these situations and that of a transsexual person is that while changing one's religion or nationality is generally considered to be a legitimate personal choice, 'the very idea that one sex can change into another' is likely to engender 'ridicule and horror.' " Currah & Minter, supra note 4, at 41.

26. *Holloway*, 566 F.2d at 663 ("The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex").

27. The cultural bias in these cases is evidenced by, for example, the courts conjecturing *sua sponte* that employing a transgender person creates difficulties for the employer. For example, the Eighth Circuit suggested in *Sommers* that "Budget faces a problem in protecting the privacy interests of its female employees." Sommers, 667 F.2d at 750. Not only was the record devoid of evidence to support such assertion, but it was legally irrelevant.

28. *See, e.g., In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002) ("The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals").

"freakish" third sex whose marginalized status, though based on their sex, paradoxically could not be protected by a law that prohibits sex discrimination.[29]

While some contemporary courts continue to rely on these decisions, the general trend, fortunately, has been toward an expanded understanding and application of sex discrimination statutes. This change has helped transgender people bring successful claims of discrimination in employment and other areas.[30]

The legal climate for transgender claimants improved dramatically in 1989 when the Supreme Court decided the landmark case of *Price Waterhouse v. Hopkins*.[31] The plaintiff, a female associate at the accounting firm, was denied partnership because, in the words of the partners, she was too "macho," too aggressive, did not wear enough make-up, and could use a "course in charm school."[32] In other words, she did not conform to the stereotype of what the partners thought a woman should look like or how a woman should act. The Supreme Court clarified that sex discrimination laws are intended to strike at a broad range of discrimination, including discrimination based on sex stereotypes.[33] In doing so, the Court rejected Price Waterhouse's argument that it had not discriminated against Ann Hopkins because she was a woman, but rather

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29. While the district court rejected the contention that Karen Ulane was "freakish," Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 827 (N.D. Ill., 1983), the Seventh Circuit impliedly embraced it in reversing the district court's judgment. *Ulane*, 742 F.2d at 1087.

30. *See, e.g.*, Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 214 (1st Cir. 2000) (plaintiff, a biological male who alleged that he was denied an opportunity to apply for a loan because he was not dressed in "masculine attire," may have a valid sex discrimination claim under the Equal Credit Opportunity Act, a law construed pursuant to Title VII analysis); Jette v. Honey Farms Mini Market, 2001 WL 1602799, at *1-2 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (Massachusetts' disability law does not explicitly exclude transgender people from protection discrimination based on disability or sex); Millett v. Lutco, 2001 WL 1602800, at *3 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (Massachusetts state law prohibiting discrimination on basis of sex also encompasses discrimination against transgender individuals); Enriquez v. West Jersey Health Systems, 777 A.2d 365, 373-74 (N.J. Super. Ct. App. Div. 2001) ("sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman"); Declaratory Ruling on Behalf of John/Jane Doe (Conn. Comm'n on Human Rights & Opportunities Nov. 9, 2000) (transgender people protected under Connecticut state laws prohibiting sex discrimination) *available at* http://www.state.ct.us/chro/metapages/HearingOffice/HODecisions/declaratoryrulings/DRDoe.htm; Doe v. Yunits, 2000 WL 33162199, at *6-7(Mass. Super. Ct., Oct. 11, 2000), *aff'd sub nom,* Doe v. Brockton Sch. Comm., No. 2000-J-683 (Mass. App. Ct. Nov. 30, 2000) (transgender student had viable claim under Massachusetts sex discrimination laws); Rentos v. OCE-Office Systems, 1996 WL 737215 at *8 (S.D.N.Y. Dec. 24, 1996) ("remedial purpose of the state statute was by blanket description to eliminate all forms of discrimination, those then existing as well as any later devised") (internal quotations omitted); Maffei v. Kolaeton Industry, Inc., 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) (discrimination based on transgender status violates city ordinance prohibiting sex discrimination).

31. 490 U.S. 228 (1989).

32. *Id.* at 235.

33. *Id.* at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").

because she was a woman who failed to look and act like one.[34] Subsequent cases have applied the same analysis in cases involving male employees who fail to conform to masculine stereotypes.[35]

*Price Waterhouse* is significant because it establishes that prohibitions against sex discrimination apply to a broader range of discriminatory conduct than the stereotypical case of disparate treatment on the basis of biological sex. As a result of *Price Waterhouse*, it is clear today that sex discrimination also means that employers cannot discriminate on the basis of characteristics that are usually associated with being either masculine or feminine.

*Price Waterhouse* has shifted the way courts analyze cases brought by transgender litigants. In the last five year, courts and administrative agencies in a number of jurisdictions have acknowledged that there is no principled reason to exclude transgender people from coverage under sex discrimination statutes.[36] As a result, transgender people in some jurisdictions have at least some degree of legal protection when employers, public accommodations, lenders, or landlords discriminate against them.[37]

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34. *Id.* at 256 ("It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school' ").

35. *See* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir.1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity") (internal citations omitted); Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (same).

36. *See supra*, note 28. *See, e.g.*, Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 214 (1st Cir. 2000) (plaintiff, a biological male who alleged that he was denied an opportunity to apply for a loan because he was not dressed in "masculine attire," may have a valid sex discrimination claim under the Equal Credit Opportunity Act, a law construed pursuant to Title VII analysis); Jette v. Honey Farms Mini Market, 2001 WL 1602799, at *1-2 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (Massachusetts' disability law does not explicitly exclude transgender people from protection discrimination based on disability or sex); Millett v. Lutco, 2001 WL 1602800, at *3 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (Massachusetts state law prohibiting discrimination on basis of sex also encompasses discrimination against transgender individuals); Enriquez v. West Jersey Health Systems, 777 A.2d 365, 373-74 (N.J. Super. Ct. App. Div. 2001) ("sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman"); *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Comm'n on Human Rights and Opportunities Nov. 9, 2000) (transgender people protected under Connecticut state laws prohibiting sex discrimination) *available at* http://www.state.ct.us/chro/metapages/HearingOffice/HODecisions/declaratoryrulings/DRDoe.htm; Doe v. Yunits, 2000 WL 33162199, at *6-7(Mass. Super. Ct., Oct. 11, 2000), *aff'd sub nom,* Doe v. Brockton Sch. Comm., No. 2000-J-683 (Mass. App. Ct. Nov. 30, 2000) (transgender student had viable claim under Massachusetts sex discrimination laws); Rentos v. OCE-Office Systems, 1996 WL 737215 at *8 (S.D.N.Y. Dec. 24, 1996) ("remedial purpose of the state statute was by blanket description to eliminate all forms of discrimination, those then existing as well as any later devised") (internal quotations omitted); Maffei v. Kolaeton Industry, Inc., 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) (discrimination based on transsexual status violates city ordinance prohibiting sex discrimination).

37. Enriquez v. West Jersey Health Systems, 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001) (In employment context, court held "The word 'sex' as used in the LAD should be interpreted to include gender, protecting from discrimination on the basis of sex or gender. . . . We conclude that sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender

Judges and human rights commissioners were not convinced to follow the *Price Waterhouse* reasoning in extending the laws' protections to transgender people simply as a result of clever lawyering. Based on my own experiences litigating cases in Connecticut and Massachusetts courts and administrative agencies, and working on legislation in Rhode Island, I believe that the work of medical professionals in educating the public about transsexualism, gender identity disorder, and transgender people has contributed immensely to changing and opening the minds of judges, along with other members of the legal and political communities.

Looking at dicta from a recent case and a human rights commission decision with favorable outcomes for transgender litigants proves this point. For example, in New Jersey, a transgender doctor brought a claim analogous to the one brought by Karen Ulane eighteen years before.[38] Rather than discussing the case as not being rooted in sex discrimination as in *Ulane*, the *Enriquez* court saw a legal connection earlier courts had ignored.[39] While it is difficult to conjecture the reason for the *Enriquez* court's departure from the earlier analyses, it is fair to assume that the submission of medical testimony related to the plaintiff's condition humanized her in the eyes of the court. Although not essential to the analysis, the judge noted the medical etiology of the plaintiff's condition and included medical facts in some detail. As the court explained,

> Gender dysphoria is regarded medically as a 'mental disorder occurring in an estimated frequency of 1:50,000 individuals.' Cole, Emory, Huang, Meyer, *Treatment of Gender Dysphoria*, 90 *Tex. Med.* 68 (1994). Moreover, treatment for the disorder can now 'be regarded as accepted medical practice.' The disorder is recognized within DSM-IV, thus confirming that the condition can be diagnosed by accepted clinical techniques. In fact, the DSM-IV lists four criteria necessary for diagnosing a gender identity disorder.[40]

Similarly, in Connecticut a recent request for declaratory ruling asked whether the existing state sex discrimination law covers transgender litigants.[41] The Connecticut Commission on Human Rights and Opportunities ("CHRO") answered in the affirmative. Here again, while not essential to the legal analysis, the Commission referred to medical information pertaining to transgender people

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stereotyping and discrimination for transforming herself from a man to a woman."); *Rosa*, 214 F.3d at 215 (lender may not discriminate on basis of sex stereotyping under Equal Credit Opportunity Act).

38. *Enriquez*, 777 A.2d at 365.

39. *See Id.* (The court held in Enriquez that sex discrimination statute should be liberally construed and that discrimination on the basis of sex may include gender discrimination).

40. *See Id. at* 519-520.

41. Declaratory Ruling on Behalf of John/Jane Doe (Conn. Comm'n on Human Rights and Opportunities Nov. 9, 2000) *available at* http://www.state.ct.us/chro/metapages/HearingOffice/HODecisions/declaratoryrulings/DRDoe.htm. (last visited Sep. 26, 2003).

in support of its ruling. As the CHRO explained, "[t]ranssexual individuals are classified by the medical profession as those individuals who have gender identity conflict, gender dysphoria, and/or gender identity disorder."[42] Further, the U.S. Supreme Court has defined a transsexual [as], one who has "[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex," and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change. *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (quoting American Medical Association, *Encyclopedia of Medicine* 1006 (1989)).[43]

As these examples illustrate, medical professionals have humanized transgender people in the eyes of judges and in doing so have explained why discrimination against transgender people is wrong. This educational work has gone a long way in dissuading judges and other policy makers of the notion that transgender people are a freakish third sex unworthy of legal protections.[44] Medical professionals' ability to explain the medical necessity for surgery and hormone therapy for some transgender people[45] has validated the condition and established an accepted standard of care. Framing the plight of transgender

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42. *See generally The Standards of Care for Identity Disorders* (Fifth version, June 15, 1998), Harry Benjamin International Gender Dysphoria Association (Doe Petition, Exhibit C. *See also* American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders* (Fourth Edition, 1994) ("DSM-IV").

43. *See supra* note 41. *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Comm'n on Human Rights & Opportunities Nov. 9, 2000) *available at* http://www.state.ct.us/chro/metapages/HearingOffice/HODecisions/declaratoryrulings/DRDoe.htm. (last visited Sep. 26, 2003).

44. Educational work on the part of medical professionals has also been helpful in humanizing transgender persons litigating in other non-employment contexts. *See, e.g., Smith v. Rasmussen*, 57 F. Supp. 2d 736, 769-70 (N.D. Iowa, 1999), *rev'd*, 249 F.3d 755 (8th Cir. 2001) ("[T]here are appropriate screening standards adhered to by the subspecialty of practitioners devoted to treating gender identity disorder, the Harry Benjamin Standards. Although sex reassignment surgery may be relatively unknown, at least outside of the community of professionals actively involved in treatment of gender identity disorder, there is sufficient 'authoritative evidence' that sex reassignment surgery is both safe and effective as a treatment for extreme cases of gender identity disorder which do not respond to psychotherapy or other treatment."); *see also* Kosilek v. Maloney, 221 F. Supp. 2d 156, 158 (D. Mass. 2002) (recognizing that Kosilek suffers "from a severe form of a rare, medically recognized, major mental illness—gender identity disorder . . . [which] has caused Kosilek to suffer constant mental anguish"). A rigorous analysis of the state of the law for transgender litigants in the areas of health care and prisons is beyond the scope of this essay.

45. "In persons diagnosed with transsexualism or profound GID, sex reassignment surgery, along with hormone therapy and real-life experience, is a treatment that has proven to be effective. Such a therapeutic regimen, when prescribed or recommended by qualified practitioners is medically indicated and medically necessary. Sex reassignment is not 'experimental,' 'investigational,' 'elective,' 'cosmetic,' or optional in any meaningful sense. It constitutes very effective and appropriate treatment for transsexualism or profound GID." HBIGDA Standards of Care, *at* http://www.hbigda.org/socv6sm.pdf (last visited October 27, 2003), *see also* FRIEDEMANN PFAFFLIN, ASTRID JUNGE, SEX REASSIGNMENT. THIRTY YEARS OF INTERNATIONAL FOLLOW-UP STUDIES AFTER SEX REASSIGNMENT SURGERY: A COMPREHENSIVE REVIEW, 1961-1991 *available at* http://www.symposion.com/ijt/pfaefflin/6003.htm (Last visited October 27, 2003) (follow-up surveys of post-operative transsexuals showed that "[t]he most important effect in the patients' opinion was the lessening of suffering with the added increase of subjective satisfaction").

people in this context has helped humanize them in the eyes of the court and has contributed to debunking the myth that they are "freakish."

The changes in both law and mindset have enabled human rights commissions to begin educating employers about how to treat transgender people with fairness, dignity and respect. Medical professionals have been and continue to be integral in this educational work, all of which is good news for transgender people and for society generally, as we all benefit when an individual's potential is not limited by discrimination.

## II. FAMILY LAW

While transgender litigants have made substantial progress in the area of employment non-discrimination law as courts increasingly reject the notion that transgender people are a freakish third sex; the news is not nearly so positive in the arena of family law. These family law decisions, fueled by the same prejudice initially encountered in employment non-discrimination cases, threaten to reverse the positive gains in the employment context. Hopefully, we can learn from the historical developments there and take affirmative steps early, including incorporating medical testimony in family law cases, in order to avoid spending the next thirty years working to reverse harmful family law precedents.

In two recent decisions, state courts in both Kansas and Texas invalidated the marriages of transgender people solely because one of the partners was transgender.[46] Several older cases jeopardize healthy and important relationships between transgender parents and their children.[47] In the custody context, the Nevada Supreme Court upheld the termination of a transgender parent's parental rights solely based on the parent's transgender status.[48] A Minnesota appellate court granted custody to a transgender parent contingent upon the parent's agreement to hide the fact that she was transgender.[49] In 1997, a state appeals court in Missouri reversed an order that awarded joint legal, not even physical, custody to a male-to-female transgender parent and imposed an indefinite moratorium on visitation.[50] The court based its decision on an unsupported

46. *See, e.g., In re* Estate of Gardiner, 42 P.3d 120, 122 (Kan. 2002) (the court concluded that the marriage between a man and a transgender woman was void under Kansas law); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (the court reached the same conclusion under Texas law).

47. *See* Daly v. Daly, 715 P.2d 56, 70-71 (Nev. 1986) (in terminating transgender father's parental rights, the court stated that the decision to transition was his "choice" and that he is a "person whose own needs, desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter."); J.L.S. v. D.K.S., 943 S.W.2d 766, 772 (Mo. Ct. App. 1997) (the appellate court reversed trial court decision to grant joint legal custody and suspended father's visitation rights indefinitely based on the conclusion that seeing their father as a woman would be "emotionally confusing" and "impair the boys' emotional development."); *See also In re* Custody of T.J., 1988 WL 8302, at *3 (Minn. Ct. App. Feb. 9, 1988) (the court granted custody to father in spite of his "gender dysphoria" only where he was undergoing therapy and decided to "maintain his male gender").

48. *Daly*, 715 P.2d at 70-71.

49. *Custody of T.J.*, 1988 WL 8302, at *3.

50. J.L.S. v. D.K.S., 943 S.W.2d at 772.

conclusion infused with bias that, for the children, seeing their father as a woman would be "emotionally confusing."[51] Neither social science nor legal doctrine dictated that ruling. The impetus for the decision was pure judicial prejudice and resulted in the court's complete disregard for the traditional best-interests-of-the-child analysis that governs decisions in custody cases.

The right to marry is a fundamental right protected by the United States Constitution.[52] Nevertheless, courts have invalidated transgender peoples' marriages with little or no legal analysis. Consider, for example, the case of *Littleton* that involved the validity of the 1989 marriage of, Christie Lee Littleton, a male-to-female transgender woman, to Jonathan Mark Littleton, a biological male.[53] The marriage took place nearly ten years after Christie Lee transitioned,[54] a fact known by her husband.[55] Seven years into their marriage, Jonathan died, allegedly due to medical malpractice.[56] Christie Lee brought a wrongful death claim, a right enjoyed by all legal spouses.[57] Rather than challenge the case on its merits, the defendant contested the lawfulness of Christie's marriage.[58] Finding the marriage invalid, the Texas Appellate Court ignored the medical and factual reality that Christie Lee was a woman, having taken hormones and having undergone sex-reassignment,[59] and ruled instead that she was a man. In the absence of live medical testimony, the court inaccurately concluded, "[s]ome physicians would consider Christie a female; other physicians would consider her still a male."[60] Relying on metaphysics over science, the court stated, "there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics,"[61] and determined that it must not "wander too far into the misty fields of sociological philosophy."[62] "Some things," said the court, "we cannot will into being. They just are."[63] Apparently relying on its own understanding of science, the court concluded that because Christie had the chromosomes of a man—a fact never even entered as evidence before the Court—her marriage to Jonathan was one between two people of the same sex.[64] Because Texas law outlaws marriages between people

51. *Id.*
52. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival"); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("right to marry is of fundamental importance for all individuals").
53. Littleton v. Prange, 9 S.W.3d 223, 225 (Tex. App. 1999).
54. *Id.* at 225.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. Littleton, 9 S.W.3d at 230-31.
60. *Id.* at 224.
61. *Id.* at 231.
62. *Id.*
63. *Id.*
64. *Id.*

of the same sex, the court ruled the marriage invalid, and on that basis denied her wrongful death claim.

Unfortunately, the damaging effect of *Littleton* has spread beyond Texas.[65] In a similar case brought in Kansas, the estranged son of Marshall Gardiner challenged the right of a transgender woman, J'Noel Gardiner, to her share of the decedent's estate as his widow.[66] The lower court adopted wholesale the *Littleton* court's reasoning and determined "some physicians would consider J'Noel a female; other physicians would consider her still a male. Her female anatomy, however, is still all man-made. The body J'Noel inhabits is a male body in all aspects other than what the physicians have supplied. . . . From that the Court has to conclude, and from the evidence that's been submitted under the affidavits, as a matter of law, she—J'Noel is a male."[67] The Kansas intermediate appellate court, detailing the medical and factual information the lower court should consider in determining J'Noel's legal sex, reversed and remanded.[68] In doing so it "reject[ed] the reasoning of the majority in the *Littleton* case as a rigid and simplistic approach to issues that are far more complex than addressed in that opinion."[69] The Kansas Supreme Court reversed.[70] In arguably more draconian language than that used by the Texas Appeals Court in *Littleton*, the Kansas Supreme Court called into question the very ability of transgender people to marry at all. The Court stated that "a marriage is the legal status, condition, or relation of one man and one woman (internal citation omitted)."[71] The Court noted that " 'male' and 'female' in everyday understanding do not encompass transsexuals."[72] As a result, the right of a transgender person to marry at all in Kansas is tenuous at best.

There have, however, been some favorable decisions in the family law context. In Orange County California, petitioner Kristie Vecchione sought to annul her marriage to her husband, Joshua Vecchione, claiming that Joshua was not a man because he is transgender.[73] Thus, she concluded theirs was a "same-sex"

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65. This decision generally follows the reasoning of a case originating from the United Kingdom, considered to be foundational in this area of the law. *See* Corbett v. Corbett, 2 All E.R. 33 (P.1970)

66. Estate of Gardiner, 42 P.3d at 123.

67. *In re* Estate of Gardiner, Estate No. 9908 PE 00119, slip op. at 7-9 (Dist. Ct. Kan. Jan. 21, 2000).

68. *In re* Estate of Gardiner, 22 P.3d 1086, 1110 (Kan. App. 2001). While the intermediate appellate court's decision was fairer than in *Littleton* and was hailed by some transgender advocates, the off reasoning was troubling nonetheless. The appeals court said that there should be a case-by-case determination of a transgender person's sex based on medical and non-medical evidence but did not establish standards for determining who is male and who is female, or how the court should weigh the evidence in any given case. *Id.* Thus, even if the court's decision had stood, its reasoning leaves transgender people in a legal netherworld in which courts are left to make ad hoc determinations about the lawfulness of a marriage based on the specific facts and circumstances of the individual case.

69. *Id.* at 1110.

70. Estate of Gardiner, 42 P.3d at 135.

71. *Id.* at 135.

72. Id.

73. *In re* Marriage of: Kristie Vecchione & Joshua Vecchione, No. 96D003769 Slip Op. at 2 (Cal. Super. Ct. October 22, 1998).

marriage and not recognized under the law.[74] Kristie used this claim, in turn, to contend that Joshua was not the father of their child, Briana, who was conceived through alternative insemination during their marriage.[75] The court disagreed, stating that "Joshua Vecchione, who the court finds was born a female and has gone through the transgender surgery, is for all marital purposes a male and the nullity requested based on same-sex marriage is denied."[76] As a consequence of that finding, the judge declared that the "child born as the result of artificial insemination in a marriage context is the child of that marriage and is the child of the husband and wife."[77] Thus, "Joshua Vecchione is the father of Briana."[78]

In Florida, a trial court granted a transgender parent, Michael Kantaras, primary residential custody of his two children[79] after his wife of ten years challenged the validity of their marriage in an attempt to strip him of his parental rights.[80] In order to resolve the question of whether the marriage was valid, the judge took on the task of determining "what is a man and what is a woman."[81] Unlike the judge in *Gardiner* and *Littleton*, the judge in *Kantaras* deferred to expert testimony of medical professionals in making his decision, acknowledging that "Drs. Bockting, Huang, Cole, and Dies contributed significantly to the outcome of this case."[82] The medical complexity of the determination extended far beyond dictionary definitions of "sex."[83] "[B]ased on the testimony of medical experts, Drs. Bockting, Huang and Cole in this case," the trial court concluded that Michael's sex was indeed "male."[84] The finding of marital validity was important not only to Michael's parental rights but also in determining the best interest of the children. "These children have had the benefits and protection that the law provides to married parents. [They] have a legally sanctioned family with all the law's benefits and privileges. . .If the marriage of their parents is declared 'invalid' *ab initio*, these children will have lost what the marriage statute of Florida was intended to provide, especially, the 'right of support.' "[85] "These consequences [of invalidating the marriage] are deplorable. The consequences of 'divorce' is [sic] bad enough as a 'fall out' on the children, without hindering their rightful development into adulthood by having their birth legitimacy put in question. These children are innocent and have been intentionally drawn into this adult conflict over transsexualism which a

74. *Id.* at 2.
75. *Id.* at 3.
76. *Id.*
77. *Id.* at 3.
78. *Id.*
79. *In re* The Marriage of Michael J. Kantaras and Linda Kantaras, Reporter at 808 (2003).
80. *Id.* at 132.
81. *Id.* at 708.
82. *Id.* at 767.
83. *Id.* at 709. ("[I]n the opinion of this Court, the battle of the dictionaries is not an adequate substitute for medical knowledge").
84. *Id.* at 771.
85. *Id.* at 772.

narrow and rigid interpretation of the Florida marriage statute can lead to calamitous results for these children."[86]

In order to influence the course of future cases addressing the validity of transgender marriages, one should consider the issues, both cultural and legal, that drive outcomes like *Littleton* and *Gardiner*. The first factor, of course, is homophobia.[87] In every state in this country and in nearly every country in the world—except the Netherlands, Belgium, and, most recently, Canada—gay and lesbian couples are prevented from marrying.[88] In other words, to be a marriage, the two spouses must include one man and one woman. Even in Vermont, where the highest court agreed that denying gay and lesbian couples the right to marry violated principles of equality guaranteed by the state constitution,[89] there is a legal marital status that is distinct from marriage for same-sex couples.[90] Although civil unions provide virtually all of the rights and responsibilities of marriage, they do not grant equal access to marriage. And, in the wake of the Vermont case, the state legislature was not particularly concerned with the outcome for transgender people in the adoption of the civil union law. For example, the resulting civil union law allows only same-sex couples to enter into that newly minted status.[91] The civil union law does not answer the question for transgender people about who we may marry. In contrast, the Netherlands law allows any two adults to marry regardless of sex, which is perhaps the only certain way to protect the marriages of transgender people. Unfortunately, no state in this country to date has allowed couples to marry regardless of the sex of the spouses.[92]

The second factor behind outcomes like *Littleton* and *Gardiner* is that many family law courts remain driven by the notion that transgender people are a freakish third sex who do not deserve protection when cases concerning marriage and rights and responsibilities relating to children arise. The fact that the family law arena involves emotionally and culturally charged matters about children and procreation only highlights this thread of prejudice and misunderstanding. It is

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86. *Id.* at 773.

87. The homophobic motivation behind numerous cases involving transgender litigants has been addressed at length in other works. *See generally e.g.*, ANDREW SHARPE TRANSGENDER JURISPRUDENCE (2001).

88. As of April 2001, the Netherlands allows same-sex couples to marry. The Dutch law eliminated all references to gender in laws covering marriage and adoption and amended the dictionary to remove references to "man and woman" in the definition of marriage.

89. Baker v. State, 744 A.2d 864 (Vt. 1999).

90. *See* Vt. Stat. Ann. tit. 15, § 1200 (2002).

91. *See* Vt. Stat. Ann. tit. 15, § 1202 (2002) ("For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union . . . [b]e of the same sex and therefore excluded from the marriage laws of this state.").

92. Two pending cases, one in Massachusetts and one in New Jersey, offer hope for equality in marriage for all couples. Granting marriage licenses to same-sex couples, could ensure that all marriages entered into by transgender individuals are legally respected. Goodridge et al. v. Department of Public Health et al., 2002 WL 1299135 (Mass., May 7, 2002); and Lewis et al. v. Harris et al., No. L-425502 (New Jersey).

thus in the context of family law cases that the testimony of medical professionals can be most helpful.

Illustrative of this point, the *Kantaras* judge himself opined on the value of live medical testimony in rejecting the findings in *Gardiner* that transgender people do not fit the definition of their transitioned sex because the definitions proffered were "strictly legal rather than medical."[93] "Any challenge to [dictionary definitions], if there be one, based on medical science must be convincingly presented in the record . . . [and] has to be based on sound medical evidence."[94] The Court criticized *Littleton* for the absence of "live testimony in court by these two doctors."[95] "These doctors did not testify in court at all. They were not subject to questioning about how they arrived at their conclusions or subject to cross-examination. All their testimony was 'proposed' and submitted only in proposal form in 'affidavits,' attached to the response to a motion for summary judgment. . . . The *Gardiner* case suffers from the same record deficiency."[96] Moreover, in determining Michael's sex, the *Kantaras* judge emphasized the importance of medical testimony: "That is where the medical community comes to the aid of the Court. . . . He may be a transsexual man as an additional feature of his heterosexual makeup, but nevertheless, medical science declares him to be a man. The law has no basis in medical fact to reclassify what science declares. There is no authority given the courts to practice medicine. And, least of all, the subjective bias of a judge is not to be disguised as legislative intent."[97]

Several recent cases highlight the struggle courts are grappling with in the family law area when facing the question of what steps an individual must take to transition for legal purposes from one sex to another. In some instances, medical testimony has been a critically important means of educating the court about transgender people. While not necessary (or possibly even helpful in some cases), medical professionals can play an instrumental role in ensuring that children's relationships with parents are protected despite cultural biases and lack of understanding about transgender people's lives.

## III. A MODEST PROPOSAL

Legal and medical professionals can play a critical role in supporting and encouraging positive outcomes in family law cases involving transgender people. Until marriage is available to everyone, we should seek to secure a legal rule that reflects the emerging medical consensus among experts in the field. In addition, medical experts can help to develop empathy in the greater community toward transgender litigants and, more specifically, help individual litigants to secure

93. Kantaras at 725.
94. *Id.* at 769-70.
95. *Id.* at 767.
96. *Id.* at 768.
97. *Id.* at 708.

rights by chipping away at deeply held cultural prejudices that do not reflect medical realities.

When people who identify and are living as members of their new gender have undergone whatever medical treatments are determined necessary for that person, the law should recognize the person's reassigned sex for all purposes, including marriage, custody, divorce, and any other family-law related matters. While this may seem obvious insofar as it simply reflects the emerging medical consensus, the road ahead will not be smooth. The participation of medical professionals in working to achieve this result is critical to secure legal successes as well as humanity, dignity, and basic civil rights for transgender people.

In addition to endorsing a legal rule based in medical reality, there are several specific ways in which medical professionals can play key roles in this legal work: professionals who specialize in working with transgender clients can work more diligently to increase awareness in the courts as well as among others in the medical community about contemporary medical knowledge and practices regarding transgender people. This includes educating others about the differences among transgender people and the need for a flexible, individualized approach to medical treatment, an approach endorsed by the HBIGDA Standards of Care.

It would also be particularly helpful for specialists to educate others about some of the most common differences in the treatments provided to transgender men and women as well as debunking some of the more popular myths. For example, while a significant percentage of transgender women have genital reconstructive surgery, the great majority of transgender men do not. The reasons for this include the medical limitations in developing an effective prosthesis, some of the long-term complications from the surgery, and the expense, which puts it out of reach for most people, particularly in light of its general exclusion from insurance coverage.

Another common misconception that medical providers can address to the courts and medical community is that all transgender people fit the classic description of being trapped in the "wrong body." While this description rings true for some transgender people, others have a different and more complex experience. Similarly, many people mistakenly believe that all transgender people feel compelled to undergo hormone treatment and genital surgery. Again, while this is true for some transgender people, it is not true for all. Determining which steps are medically appropriate and necessary for any given person requires an individualized inquiry.[98] For some people, the appropriate steps

98. "[T]he diagnosis of GID invites the consideration of a variety of therapeutic options, only one of which is the complete therapeutic triad [of hormones, therapy, and sex reassignment surgery]. Clinicians have become aware that not all persons with gender identity disorders need or want all three elements of triadic therapy." The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version (February 2001) *available at* http://www.hbigda.org/soc.html.

include only hormone therapy. For others, it includes surgery. For many female-to-male transsexuals, phalloplasty, or the surgical construction of a phallus, is not considered medically necessary, particularly given some of the limitations of the surgery complications and associated risks.[99] Non-surgical options, such as hormone therapy, are also increasingly the choice for some male-to-female transsexuals as well.

It is important to provide policy makers, including the legal community and government agencies that deal with these questions, with a broader conception of what constitutes sex-reassignment. Medical professionals can do much to dispel the myth that the process of sex-reassignment consists of a single operation. Sex-reassignment is an individualized process that generally involves hormone therapy, the real-life experience (living full-time in one's appropriate gender), and if determined to be medically necessary for a particular individual, one or more of several different kinds of sex-reassignment surgery.[100] No single surgery or treatment is necessary in every case. The established medical view concludes otherwise.

Determining whether someone has undergone what some laws refer to as "sex-reassignment, so called,"[101] is a more complicated question than whether someone has had a phalloplasty or a vaginoplasty. Unbeknownst to many judges, there are a range of surgeries available to individuals based on their medical condition, including hysterectomy, orchiectomy, bilateral mastectomy, metaoidioplasty, and others. Sex-reassignment and transitioning includes identifying and living as the other gender as well as hormonal therapy. The appropriate treatment is based on individual assessment.[102] No single procedure is necessary in every case.

There also needs to be a broader understanding that there is no hierarchy of

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99. *See In Re* The Marriage of Kantaras v. Kantaras, 320-339 (Testimony of Dr. Ted Huang).

100. *See* The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version (February 2001) *available at* http://www.hbigda.org/soc.html (last visited on October 28, 2003) ("The SOC provide for an individual approach for every patient; but this does not mean that the general guidelines, which specify treatment consisting of diagnostic evaluation, possible psychotherapy, hormones, and real-life experience, can be ignored. However, if a person has lived convincingly as a member of the preferred gender for a long period of time and is assessed to be a psychologically healthy after a requisite period of psychotherapy, there is no inherent reason that he or she must take hormones prior to genital surgery").

101. Mass. Gen. Laws Ann. ch. 46, § 13e (West 2002) ("If a person has completed sex reassignment surgery, so-called, and has had his name legally changed by a court of competent jurisdiction, the birth record of said person shall be amended to reflect the newly acquired sex and name, provided that an affidavit is received by the town clerk, executed by the person to whom the record relates, and accompanied by a physician's notarized statement that the person named on the birth record has completed sex reassignment surgery, so-called, and is not of the sex recorded on said record. Said affidavit shall also be accompanied by a certified copy of the legal change of name aforementioned above").

102. *See* The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version (February 2001) *available at* http://www.hbigda.org/soc.html (last visited at October 28, 2003).

treatment. A person who has multiple surgeries and is on hormones is no more "fully transitioned" than a person who is living as the other gender and has experienced the profound physical changes that result from hormone therapy. As more states permit transgender people to change their birth certificates (as Connecticut recently did),[103] this issue becomes increasingly significant with respect to transgender people's marriages.

Litigants need medical professionals' help in the courts to support arguments that transgender people are emotionally stable and are good parents applying the same criteria used to evaluate non-transgender people. No categorical reason based on a diagnosis of GID or gender dysphoria exists to deny transgender people continued contact with their children, including physical custody.[104] This role is critical because of the characterization of transgenderism as a psychiatric disorder. Even acknowledging differences of opinion within the leading medical professional organization, the Harry Benjamin Gender Dysphoria Association (HBIGDA), regarding the origin of the condition that transgender people experience, there is no disagreement about its legitimacy or medical reality. Regardless of where one stands on this issue, whether transsexualism is properly characterized as a mental health or physical condition, there is no reason to believe that being transgender renders a person unstable or unfit to care for children.

Finally, medical professionals should not hesitate to confirm that a person who identifies and is living as a member of his/her reassigned sex, and who has undergone all of the medically necessary steps for that individual to transition from one sex to another, should be considered a member of the reassigned sex for all purposes.

## CONCLUSION

As our movement for civil rights gains momentum, there will be setbacks as well as advances for transgender people. The more that courts and others involved in the legal world know about the reality of transgender people's lives, the better the outcomes will be. In particular, the role of medical professionals may be key in many cases, particularly where they can explain an individual's condition and the ways it relates (or does not relate) to the legal question at issue in the case.

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103. Conn. Gen. Stat. Ann. § 19a-42a (West 2002).

104. *See* Richard Green, M.D., *Transsexuals' Children*, 2 The International Journal of Transgenderism 4 (Oct.– Dec. 1998) *available at* http://www.symposion.com/ijt/ijtc0601.htm ("Available evidence does not support concerns that a parent's transsexualism directly adversely impacts on the children. By contrast, there is extensive clinical experience showing the detriment to children in consequence of terminated contact with a parent after divorce. The cases described here and twenty years earlier demonstrate that transsexual parents can remain effective parents and that children can understand and empathize with their transsexual parent. The cases demonstrate that gender identity confusion does not occur and that any teasing is no more a problem than the teasing children get for a myriad of reasons"); Richard Green, M.D., *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents* 135 Amer. J. Psychiatry 692 (1978).